

## EVIDENCE OF CHARACTER IN CIVIL AND CRIMINAL PROCEEDINGS.

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In our law, the word character has no single, well defined, technical meaning. Sometimes it means actual character, disposition, what a person is, and sometimes it means reputed character, reputation, community opinion as to character, what a person is supposed to be. When used in the sense of nature or disposition, sometimes it means the entire character, the "sum of the inherited and acquired ethical traits which gave to a man his individuality," as when we speak of good or bad character generally; and sometimes it means a single trait of character, as when we speak of a person's honesty, chastity, or veracity. Sometimes it has reference to moral traits or qualities and sometimes not.

It is probably true, however, that in law, as in common speech, the word character usually means moral character, and actual character, as distinguished from reputation; though from the fact that reputation is in law the chief means of proving character, the words character and reputation are frequently but improperly used as if they were synonymous.

Character is what a person is, reputation is what the community thinks he is; but evidence of the general reputation of a person affords the basis for an inference as to the actual character; for behind a good reputation usually there lies a good character, and behind a bad reputation a bad character.

Evidence of character is admissible, under certain limitations and for certain purposes, in civil as well as in criminal proceedings; and it is the object of this article to state briefly some of the prevailing rules governing its admissibility, and incidentally to note some of the variations from those rules prevailing in some jurisdictions.

The character sought to be proved may be that of a party to the proceeding, or that of a witness therein, or that of a person neither a witness nor a party to the proceeding.

Again character may be offered in evidence either (1) simply to prove its existence as one of the facts in the case, or (2) to prove

its existence as circumstantial evidence tending to prove some other fact therein. In the one case, character is a disputed fact whose existence may be proved by evidence, but which is neither offered nor used as evidence of any other fact; while in the other case it is offered and used as evidence, that is as the basis of an inference to some other facts in the case.

The rules relating to the admissibility of character evidence may be conveniently considered under three heads: (I) those relating to its admissibility to prove the character of a party or of a third person as one of the facts in the case; (II) those relating to its admissibility to prove the character of a party or of a third person as circumstantial evidence in the case; and (III) those relating to its admissibility to prove the character of a witness.

### I.

Cases where character may be proved as one of the facts in issue will be first considered, and these are almost without exception, civil cases. Just when, in civil cases, the character of a party is said to be "in issue" is determined by precedent rather than by principle.

At common law the character of the parties was held not to be in issue in actions upon contract, and in most actions of tort, such as trespass to land or goods, assault and battery, actions for negligence, and some others; and this rule prevailed even in civil cases charging crime or conduct grossly indecent or immoral; so that the general rule in civil cases was that the character of the parties is not in issue, and consequently evidence of it cannot be given. "Putting character in issue is a technical expression, which does not mean simply that the character may be affected by the result, but that it is of peculiar importance in the suit itself, as the character of the plaintiff in an action of slander, or that of a woman in an action upon the case for seduction."<sup>1</sup>

Certain actions, however, were held at common law to put the character of one or both of the parties "in issue" for certain purposes, and in such actions the character of such party might be proved as one of the facts in the case. The principal actions of this kind were actions of slander and libel, breach of promise of marriage, malicious prosecution and seduction.

In actions of slander and libel various questions have arisen with respect to the admissibility of evidence of character. The

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<sup>1</sup> *Potter v. Sieler*, 23 Pa. St. 424.

character of the defendant in such cases is not generally regarded as being in issue. It has been held, however, that the defendant could prove his own bad character in mitigation of damages;<sup>1</sup> but the widely prevailing rule probably is that he can not.<sup>2</sup>

Whether the plaintiff in this class of cases can give evidence of his own good character in the first instance, "not to sustain it from attack but to prove its excellence," is a question upon which the courts have differed. The prevailing rule, founded upon the fact that good character, in the absence of anything to the contrary, is taken for granted, is that he can not.

Evidence of the plaintiff's bad character is admissible in mitigation of damages on the ground that "a reputation already damaged in the very point in controversy is not so valuable commercially speaking as a reputation which is unspotted."<sup>3</sup> But whether such evidence is admissible under the general issue alone, or whether bad character must be expressly pleaded in mitigation, are questions upon which the decisions have not been quite harmonious. The widely prevailing rule is that it need not be expressly pleaded. After evidence of the plaintiff's bad character has been given, the plaintiff may of course give evidence of good character as bearing upon the question of damages.

Whether the defendant, in mitigation of damages, may show the plaintiff's general bad character, or only his bad character in respect to the trait involved in the defamation, or may show both, are questions upon which the courts are not quite agreed. Upon principle it would seem that he should be permitted to do both, but it can hardly be said that this is the prevailing rule. It is, however, well settled in this class of cases that good or bad character, whether general or in respect to some trait involved, can only be shown by evidence of general reputation, and not by evidence of specific acts.<sup>4</sup>

In actions of breach of promise of marriage the character of the plaintiff is generally held to be put in issue, at least for certain purposes. Such an action impliedly asserts that the character of the plaintiff is good, and harm to it is recognized as one of the elements of damages therein. The plaintiff's want of chastity is, under certain circumstances, a defense to the action. It may, as a defense, be shown not only by general unchaste reputation, but

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<sup>1</sup> *Gates v. Meredith*, 7 Ind. 440.

<sup>2</sup> *Hastings v. Stetson*, 130 Mass. 76.

<sup>3</sup> *Drown v. Allen*, 91 Pa. St. 393.

<sup>4</sup> In support of these statements with respect to defamation cases, see 1 *Greenleaf's Evidence*, 16 ed., sec. 14d and cases cited, and also 18 *Am. & Eng. Enc. of Law*, pp. 1099-1101.

also by evidence of unchaste acts and conduct. In such a defense unchaste character clearly means actual character rather than reputed character. When under such a defense evidence has been given of plaintiff's bad character for chastity, in either or both of the ways above mentioned, the plaintiff may, of course, give evidence to contradict the evidence as to particular acts or conduct, and also give evidence of general chaste reputation. The defendant may also, in mitigation of damages, show the bad character of the plaintiff for chastity, and his or her general bad moral character by reputation evidence, and then the plaintiff may rebut this by similar evidence of good reputation for chastity, and for good moral character.

Whether in actions of this kind the plaintiff can give evidence of good character before it has been attacked in evidence is a question upon which the decisions are not in entire harmony. On principle, as good character is generally assumed in the absence of anything to the contrary, it would seem that before it is attacked in some way, evidence in support of it should be excluded.<sup>1</sup>

In actions for malicious prosecution, harm to the plaintiff's character is usually one of the elements of damages involved in the case. Where this is so the character of the plaintiff is held to be put in issue, and the defendant may give evidence of the plaintiff's general bad character, in mitigation of damages, while the plaintiff, in rebuttal, may of course give evidence of his general good character. Such evidence of good or bad character, is confined to evidence of general reputation.<sup>2</sup>

In civil actions for seduction at common law by the father or master the character of the woman for chastity is held to be in issue; and this is true also in actions of this kind brought under statutes in many of the States either by the woman or her parent or master; indeed it is true generally in civil actions involving offenses against chastity. In all such actions where damages are claimed on account of injury to character, the bad character of the woman previous to the seduction may be shown in mitigation of damages; and such character may be shown not only by evidence of general reputation but also by evidence of particular acts and conduct showing a want of chastity. In the civil action for criminal conversation also, the character of the woman, and that of the husband, are regarded as being "in issue" under certain circumstances and for certain purposes.

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<sup>1</sup>Upon character evidence in this class of cases see 5 Cyc. p. 997.

<sup>2</sup>See cases cited in 19 Am. & Eng. Enc. of Law, p. 699.

In all of the foregoing classes of cases where character is held, in effect, to be one of the facts to be proved in the case, its existence may be proved, not as tending to prove some other fact in the case, but simply as one of the facts involved in the issue. It is not regarded as an evidential fact nor used as such.

## II.

The cases where character is admitted as an evidential fact, and the rules relating thereto, are next to be considered. In this class of cases character is regarded as circumstantial evidence tending to prove some other fact. "That a human being has a moral disposition or character of a certain sort is of more or less probative value in indicating the likelihood of his doing or not doing an act of a related sort; for example, a disposition as to violence throws light upon the probability of a violent killing, and a disposition as to honesty on the probability of committing a fraud."<sup>1</sup>

Again the character of a person may afford a fair basis for an inference as to some fact other than the conduct or acts of that person; as for example in actions for malicious prosecution the character of the plaintiff may have a bearing upon the knowledge or belief of the defendant that reasonable grounds existed for instituting the prosecution.

Evidence of character for purposes like the foregoing is admitted in both civil and criminal cases, but the civil cases in which it is admissible are comparatively few and they will be first considered. The general rule in civil cases is that the character of the parties is not admissible as evidence tending to prove their acts or conduct. "Because of the usual slight probative value of a party's character, and of its confusion of issues to little purpose, and for other reasons variously stated by different judges and not easy to disentangle or define, it has come to be generally accepted that the character of a party in a civil cause cannot be looked to as evidence that he did or did not do an act charged."<sup>2</sup>

Such evidence in civil cases is excluded, not only in cases where it has little or no probative force, as in actions upon contract, but also in actions where, if admitted, it might have considerable probative force, as in actions charging adultery or gross indecency or flagrant immorality. Thus in a civil action for divorce charging adultery against a wife, evidence of her good character was held

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<sup>1</sup> Prof. Wigmore in Greenleaf's Evidence, 16 ed., vol. 1, p. 38.

<sup>2</sup> Prof. Wigmore in Greenleaf's Evidence, 16 ed., sec. 14b (4).

to be inadmissible,<sup>1</sup> although if she had been prosecuted criminally for the adultery, evidence of her good character would have been admissible. In cases like this the rule that admits character as evidence to prove or disprove adultery in the criminal proceeding, and shuts it out when offered for the same purpose in the civil proceeding seems to be illogical and inconsistent, but it is the widely prevailing rule.<sup>2</sup>

While the weight of authority is still decidedly against the admissibility of character as evidence of conduct in civil cases, yet in civil actions charging crime or gross immorality, some courts have admitted evidence of this kind; and possibly there is a tendency in many courts to admit such evidence in that class of cases. In civil cases then the general rule is that the character of the parties, as an evidential fact, is excluded.

There are, however, a few instances in which character as an evidential fact is admissible in civil cases, and some of these will now be briefly considered. In actions for malicious prosecution the defendant may give evidence of the general bad character of the plaintiff, if known to the defendant before he instituted the prosecution, as bearing upon the reasonableness of the defendant's conduct in instituting such prosecution. "It would certainly require less stringent proof to make out probable cause for prosecuting a man of general bad character for larceny, than one who maintained a good character, and followed an occupation for a livelihood altogether lawful."<sup>3</sup>

On the other hand the defendant may in such cases prove his general good character known to the defendant to establish plaintiff's claim that there was no probable cause for the prosecution. "To prove that the attack was made without probable cause, we think he should be permitted to show his good reputation known to the defendant when the prosecution was commenced."<sup>4</sup> The courts are generally agreed as to this matter. The only evidence of character admissible in such cases is good or bad general reputation.

In actions against a master for employing or retaining in his employment, an incompetent servant, the plaintiff may prove the general character of the servant for incompetency, as evidence bear-

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<sup>1</sup> *Humphrey v. Humphrey*, 7 Conn. 116.

<sup>2</sup> The early case of *Ruan v. Perry*, 3 Caines (N. Y.) 120, held that in actions of tort charging gross depravity and fraud evidence of defendant's good character was admissible; but that case was overruled in *Gough v. St. John*, 16 Wend. 647, and has been generally disregarded.

<sup>3</sup> *Martin v. Hardesty*, 27 Ala. 458.

<sup>4</sup> *McIntire v. Levering*, 148 Mass. 546.

ing upon the knowledge of the master of such incompetency. In such cases the only evidence admissible is usually that of general reputation, and it is used as the basis of an inference as to the master's knowledge.<sup>1</sup> In some States the master is held liable in such cases if he had the means of knowing and ought to have known of the incompetency.<sup>2</sup> Some courts, in a certain class of cases involving the issue of negligence, admit evidence of the person's character for carelessness or prudence whose conduct is in question, as bearing upon the question whether he was negligent or not; but the widely prevailing rule excludes such evidence.<sup>3</sup>

There are a few other civil cases where character is admissible as circumstantial evidence of some other fact in the case, but the above are the principal instances of this kind.

Character as circumstantial evidence of acts or conduct is much more freely admitted in criminal than in civil cases. "Formerly evidence of the defendant's good character in criminal proceedings, was admitted in capital cases only, and that *in favorem vitæ*; but such evidence is now admitted in all cases where the character of the defendant is in jeopardy."<sup>4</sup>

It is now well settled that the accused, in substantially all criminal prosecutions, may give evidence of his good character in proof of his innocence; and that when he has done so, and not until then the State may give evidence of his bad character. If the accused fails to offer evidence of his good character no presumption arises that he is guilty of the offense charged, or that he is of bad character.<sup>5</sup>

Formerly it was quite generally held that such evidence on the part of the accused would be of little or no avail to him save in doubtful cases,<sup>6</sup> but the widely prevailing rule to-day is that such evidence is admissible and is a fact to be considered in all cases in favor of the accused.<sup>7</sup>

The good or bad character of the accused in such cases, can be

<sup>1</sup> See cases in note upon this point in 25 L. R. A. 710.

<sup>2</sup> *Monahan v. Worcester*, 150 Mass. 439.

<sup>3</sup> See cases cited by Prof. Wigmore in 1 Greenleaf, Evidence, 16 ed., p. 41.

<sup>4</sup> Starkie on Evidence, 2 ed., vol. 2, p. 215.

<sup>5</sup> *People v. Evans*, 72 Mich. 367.

<sup>6</sup> *Commonwealth v. Webster*, 5 Cush. 295; *McDaniel v. State*, 8 Sm. & M. 401; *Schaller v. State*, 14 Mo. 502.

<sup>7</sup> *Harrington v. State*, 19 Ohio St. 264; *Harmey v. Commonwealth*, 116 Pa. St. 322; *Commonwealth v. Leonard*, 140 Mass. 473; *People v. Garbutt*, 17 Mich. 9.

proved only by evidence of general reputation, and not by evidence of particular acts or conduct. Evidence of good character, in criminal as in civil cases, may be negative in its nature, for the best character is often the least talked about.<sup>1</sup> The accused may not only offer evidence of general good character, he may also offer evidence of specific traits of character; but such traits can only be proved by evidence of general reputation. The specific trait, offered to be proved, however, must correspond with the trait involved in the offense charged, or it will be inadmissible because irrelevant. Thus in a prosecution for homicide the accused was permitted to give evidence of his general reputation "for peace and quietude";<sup>2</sup> while in a prosecution for assault and battery evidence of his reputation for veracity was excluded as irrelevant.<sup>3</sup>

The accused, of course, may become a witness in the case on his own behalf, and when he does so, his character as witness may be attacked and defended in the same way that the character of any witness may be impeached or supported; but this will be considered later. The character of third persons, neither parties nor witnesses, is sometimes admissible in criminal cases, as circumstantial evidence, of acts or conduct. The principal instances of this kind are the following.

In prosecutions for rape the question of consent on the part of the woman is usually an important one; and evidence of her character for chastity is admissible as bearing upon the probability of consent.<sup>4</sup> The courts in this country seem to be agreed that in a prosecution for rape or an attempt to ravish, the woman's bad character for chastity may be shown by witnesses, and also that if she becomes a witness she may be examined as to her previous connection with the prisoner; but they disagree as to whether acts of connection with other men may be shown, and if so by what kind of evidence. The same agreement and disagreement measurably exists in actions for seduction.<sup>5</sup> In a prosecution for carnal knowledge of a girl under sixteen and "therefore chaste," the girl's character for chastity must be proved by the State.<sup>6</sup> In an indictment for an indecent assault the accused may show that the reputation of the woman for chastity is bad.<sup>7</sup>

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<sup>1</sup>Reg. v. Cary, 10 Cox. C. C. 25; Hussey v. State, 87 Ala. 121; State v. Lee, 22 Minn. 407.

<sup>2</sup>State v. Sterrett, 68 Iowa 76.

<sup>3</sup>Morgan v. State, 88 Ala. 223.

<sup>4</sup>State v. Foreshore, 43 N. H. 89; Regina v. Ryan, 2 Cox Cr. C. 115.

<sup>5</sup>See Chase's Stephen's Digest, article 134, and cases cited in note 2.

<sup>6</sup>People v. Mills, 94 Mich. 630.

<sup>7</sup>Commonwealth v. Kendall, 113 Mass. 210.

In prosecutions for homicide where the accused claims that the killing was in self-defence, and the question arises whether the deceased was the aggressor, the character of the deceased for violence and turbulence, is held to be admissible, as circumstantial evidence bearing upon that question. In this class of cases it is of no consequence whether the accused at the time had knowledge of the character of the deceased or not.

In this class of cases also, when the question arises whether the accused in what he did acted in reasonable apprehension of an attack, evidence of the character of the deceased as a man of violence, if known to the accused at the time, is admissible as circumstantial evidence bearing upon the question of reasonable apprehension. These last two rules are of comparatively recent origin, and are by no means universally adopted, and the courts that have already adopted them are not fully agreed as to the conditions and limitations under which the evidence should be admitted.<sup>1</sup>

### III.

There remains to be considered very briefly the rules relating to the admissibility of character as evidence bearing upon the credibility of a witness. The trait of character sought for in a witness is truthfulness, veracity, disposition to tell the truth, at the time of testifying.

The existence of this trait is assumed or taken for granted to begin with; and until the veracity of the witness is attacked in some way, evidence of his good character for veracity will not be received. This is the widely prevailing rule, but a few courts have made an exception to it in cases where the witness is in the situation of a stranger;<sup>2</sup> but in such cases the evidence is confined to evidence of veracity, and evidence of general good character is not admissible.<sup>3</sup> When the character of a witness has been assailed by the opposite party, evidence of his good character may of course be given in rebuttal.

A mere conflict of testimony, however, is not such an assault upon the veracity of a witness as will justify the admission of evidence in support of veracity; nor will a mere attack upon the veracity of a witness by counsel in argument, be ground for the

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<sup>1</sup>For a good account of these two rules see Greenleaf on Evidence, 16 ed., vol. 1, pp. 41, 43, and cases there cited.

<sup>2</sup>Rogers v. Moore, 10 Conn. 12; Merriam v. R. R. Co., 20 Conn. 345; Crook v. State, 27 Texas 198.

<sup>3</sup>Merriam v. R. R. Co., 20 Conn. 345.

admission of evidence in support of the character of the witness <sup>1</sup>

Upon the question whether impeaching and supporting evidence must be confined to evidence affecting veracity alone, or whether it may include evidence of general good or bad moral character, the courts are not at all agreed. "The fundamental trait desirable in a witness is the disposition to tell the truth, and hence the trait of character that should naturally be shown in impeaching him is his bad character for veracity. But there has always been more or less support for the use of bad general character, i. e. the man as a whole, not specifically the trait of veracity—as necessarily involving an impairment of veracity. This was the original English doctrine; but it was replaced in the early 1800s by the first mentioned principle, with the exception that the witness is allowed to base his statement as to the other's veracity, upon his knowledge of the other's general character. In this country the better doctrine that the trait of veracity only could be considered was early introduced; and this is the rule in the great majority of jurisdictions."<sup>2</sup> In a great many States, however, evidence of general bad character is admissible to impeach a witness.

Whether the evidence offered to impeach or support the character of a witness is that of character for veracity alone, or that of general moral character, the object is one and the same, namely, to ascertain the character of the witness for truth. Speaking generally such evidence either of the trait veracity, or of general moral character is confined to evidence of reputation.

There is, however, one well-known exception to this rule in case the witness has been convicted of crime. In such case the conviction may generally be shown to affect the credibility of the witness. This is generally provided for by statute. As to whether such conviction can be proved only by the production of the record, or whether it may be proved by questioning the witness and his admissions, the courts are not agreed, nor are they agreed as to the crimes that may thus be used to affect the credibility of a witness.<sup>3</sup> Quite frequently the statute removing conviction of crime as a ground of incompetency determines the kind of crime that may be used to affect credibility.

So, too, the courts are not agreed upon the form of question

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<sup>1</sup>Tedens v. Schumers, 112 Ill. 263. "Where witnesses contradict each other, the character of the one is as much impeached as that of the other." People v. Bush, 65 Cal. 129.

<sup>2</sup>Prof. Wigmore in 1 Greenleaf on Evidence, 16 ed., sec. 461a. See also the cases cited there by him.

<sup>3</sup>State v. Randolph, 24 Conn. 362; Card v. Foot, 57 Conn. 437.

that may be put to the impeaching or sustaining witness. It is generally agreed that such witness may be asked whether he knows the reputation of the witness whose veracity is in question and whether it is good or bad; and the dispute is as to whether he may further be asked "From what you know of the reputation or character of the witness would you believe him under oath?" Perhaps the preponderating weight of authority is in favor of permitting such question.<sup>1</sup>

With the single exception of convictions for crime the courts are generally agreed that general reputation in cases of impeachment cannot be established by proof of specific acts, whether brought out upon the direct or upon the cross-examination. As a general rule, with but few exceptions, reputation evidence must be confined to evidence of reputation as to veracity or general moral character, and cannot extend to proof of specific traits other than veracity. A few courts have held that a woman's character for veracity might be impeached by proof of her bad reputation for chastity<sup>2</sup> But the widely prevailing rule is the other way.

Evidence of reputation in cases of this kind should have reference to the character of the witness at or near the time when his testimony is given, and should be confined to the neighborhood where he resides and is known, and the impeaching or sustaining witness should of course be ordinarily from that neighborhood, and be able to speak to a reputation existing *ante litam motam*; but the settlement of questions in regard to these and many other matters of a like nature, is usually left largely to the discretion of the trial court. When a witness has testified to the bad reputation of another, he may be asked, on cross-examination, to name the persons whom he has heard speak of the reputation and what they said about it.

A party to a civil action, or the accused in a criminal case, may become a witness in such action or case, and when he does so, of course his character as witness may be impeached or sustained substantially like that of any other witness. By taking the stand in his own behalf, the accused, in most of the States, is held to bring himself within all the rules applicable to other witnesses; and he may be shown not only to have a bad reputation for veracity, but in many States, to have a general bad moral character. This

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<sup>1</sup>For the differences in practice as to this point see Prof. Wigmore's statement in 1 Greenleaf on Evidence, 16 ed., sec. 461c, and cases there cited.

<sup>2</sup>State v. Shields, 13 Mo. 236; R. R. v. Anthony, 43 Ind. 183; Birmingham Ry. v. Hale, 90 Ala. 8.

matter is in many of the States regulated to some extent by statute.<sup>1</sup>

As a witness the accused may be impeached by reputation evidence of character, by cross-examination as to character, by proof of conviction of crime, and in any of the ways that a witness may be impeached. He is, however, not obliged to answer incriminating questions except to the extent that he has waived his privilege to refuse to answer such questions. To what extent the accused, by taking the stand in his own behalf, waives his privilege, is a question about which the courts are not agreed.

In the case of an accused person, however, the good or bad character proved in favor of or against him as a witness cannot be used as the basis of an inference of his guilt or innocence of the crime charged against him. It cannot be used to prove that he did or did not do the act, but only to shake his credit as a witness; and a refusal to charge to this effect is error.<sup>2</sup>

The foregoing rules relating to the admissibility of character evidence to impeach or support the veracity of witnesses are the principal rules on that subject.

The rules relating to the admissibility of evidence of character, whether as a fact in issue, as an evidential fact, or as a mode of impeaching or supporting the veracity of a witness, are but a small part of the law of evidence; and this cursory survey of that part, while it discloses a substantial agreement in the decisions as to many of the principal rules, also shows that there appears to be altogether too many rules about which the courts are not agreed, and a much greater want of harmony, than is at all necessary or desirable in a matter of this kind.

Perhaps this lack of harmony is in some instances, more apparent than real, but its existence in regard to many rules is too real to be doubted, and too great not to be regretted.

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<sup>1</sup>For the cases bearing upon this matter see note to *People v. Tice*, 15 L. R. A. 609.

<sup>2</sup>*State v. Broderick*, 61 Vt. 421.